



Human Resources Insights

Employment Law Developments

NOVEMBER 2, 2017

BWC changes statute of limitations for filing claims...and MORE!

Substitute House Bill 27 went into effect **September 29, 2017**, and there are a number of changes that may impact your business.

Statute of limitations. Claimants now only have one year to file a workers' compensation claim involving an injury or death, instead of two.

Drug-testing changes. Ohio's Workers' Compensation Law currently provides for a rebuttable presumption that injuries do not occur as a result of employment if the claimant tests positive for certain substances. The bill revises the types and amounts of controlled substances to which the rebuttable presumption applies. Specifically, all controlled substances will now be listed under the statute, and threshold limits have changed to comply with federal regulations.

Payments to incarcerated dependents. An employee's dependents are now barred from collecting compensation benefits if they are incarcerated as a result of a conviction of any state or federal criminal law.

Waiver of 90-day examinations/temporary total compensation. The Bureau of Workers' Compensation (BWC) requires that claimants receiving temporary total disability benefits undergo mandatory examinations under certain circumstances (e.g., every 90 days that the claimant is on temporary total disability benefits). Previously, when the BWC waived the examination, the employer had no recourse but to pay for an examination out-of-pocket. Now, the employer may object to the waiver, and the BWC must continue with the examination.

FWW calculations. If an employee's full weekly-wage (FWW) cannot be determined, the BWC or self-insuring employer is required to pay claimant 33.33 percent of the statewide weekly wage until the wage amounts can be properly determined. After such time, any over/under payments will be assessed.

Permanent partial disability. To alleviate a backlog of permanent partial disability (PPD) applications, the BWC will dismiss a claimant's application for a PPD award if the individual fails to attend two scheduled examinations without explanation. The employee may refile the application after the dismissal.

Court appeals from the Industrial Commission. In an effort to encourage settlement and avoid the payment of unnecessary court costs, the bill extends the time to file an appeal of an

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Industrial Commission order from 60 days to 150 days if a party provides notice of intent to settle a claim within 30 days, and the opposing party does not object. An opposing party has 14 days to object to the intent to settle.

Attorney fees. The amount of attorney fees a claimant can potentially recover from the employer has been increased from \$4,200 to \$5,000.

Handicap Reimbursement Program. Employers are now permitted to benefit from the Handicap Reimbursement Program after settling a claim. Previously, state-fund employers were hesitant to settle since the full settlement would be charged to the employer's experience without advantage of the handicap. Now, the handicap discount will be applied to settlements as well.

There is a lot changing to the Ohio Workers' Compensation System! If you have any questions regarding these changes, consult an attorney.

If you have any questions, contact:



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After Charlottesville: Creating inclusive environments and avoiding employment claims

As the days pass, many Americans continue to try to make sense of the recent events in Charlottesville. And, as more Americans across the political spectrum appear interested in getting involved in advocacy or activism, employers are grappling with how to respond.

- Can I discipline an employee for off-duty conduct?
- Can I ban or limit political discussions at work or on social media?
- Should my organization issue a public statement or internal statement to employees?

A starting point for unpacking these issues and questions is understanding the labor and employment laws implicated. However, an organization's ability to limit legal exposure and rebound from workplace tensions that may follow events like Charlottesville requires much more than redeployment of Equal Employment Opportunity (EEO) policies and training.

Off-duty conduct

On August 11 and 12, 2017, demonstrators in the "the Unite Right" or "Charlottesville Rally" gathered at the University of Virginia with the stated purpose of protesting the city's decision to remove a confederate statue. The group included self-declared white supremacists, white nationalists, neo-Confederates and neo-Nazis. Carrying semi-automatic rifles, swastikas, and anti-Muslim and anti-Semitic banners, they chanted "blood and

soil" (a Nazi slogan) and other anti-Semitic and racial epithets. By the time the rally ended, a Charlottesville resident was killed by a protestor's vehicle, and two Virginia State Police pilots monitoring the event by helicopter also died when their aircraft crashed.

After video of the rally was posted, social media responded with remarkable speed to identify and shame demonstrators by name, hometown and place of employment. This led to some of the Charlottesville demonstrators resigning or reportedly being terminated by their employers.

The risks associated with terminating employees for off-duty conduct depends on a number of factors, including the nature of the employee's conduct, the employee's jurisdiction, the employee's contract or at-will status and the type of employer (*i.e.*, public versus private).

While the First Amendment is often invoked in response to controversial, off-duty speech and conduct, it only protects against government action abridging free speech and, therefore, only provides protection to public employees. And even for public employees, courts have set limits on First Amendment rights. For example, the speech must involve a matter of "public concern" and may not be protected if it causes the public to lose faith in the public employer.

Likewise, some state laws prohibit both public and private employers from taking adverse action against employees because of off-duty political

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activity. However, these state laws have exceptions, such as for conduct that materially conflicts with the employer's business activities and would, thus, not provide employee protection for the activities in Charlottesville.

Title VII, a federal law, prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion. Some have suggested that terminating a Unite the Right or similar demonstrator may constitute religious discrimination. Racial superiority and anti-Semitic theology have been found to be inconsistent with the meaning of religion under Title VII¹, but a belief in white supremacy does not preclude a group from being considered a religion.² Moreover, as attempts to compare and contrast various forms of protest continue, there is risk of other types of discrimination claims (*i.e.*, race). What is clear, however, is that employees who advocate violence, engage in violence or threaten violence, are unlikely to find legal recourse or legal sympathy if terminated.

Political discussions at work or in cyberspace

The images and recordings of the Charlottesville rally sparked local, national and global debates about race, bigotry, anti-Semitism and politics. While political and social discussions may be uncomfortable or even contentious, employers should be careful not to create absolute bans.

Under the National Labor Relations Act (NLRA), employees of union and non-union private-sector employers have a legal right to discuss terms and conditions of employment. Although political discussions are not expressly protected, political discussions can often touch upon workplace concerns. For example, an employee may state that he or she supports a particular party or group because of that entity's position on wages or workplace regulations. If there is a "direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees," then the employee's political speech may be protected.

Even where the "direct nexus" exists, however, the employee's advocacy is protected only

when it is non-disruptive and occurs during non-working time. Consequently, rules regulating workplace discussions should focus on workplace productivity and not on political positions.

Employers must also be mindful of the NLRA when responding to employee statements made on social media. In recent years, the National Labor Relations Board (NLRB) has issued guidance emphasizing that concerted activity is protected, whether it's undertaken in the office or in cyberspace. Employers should review their social media policies to ensure that they are up-to-date and do not infringe upon employee rights to discuss terms and conditions of employment or have a chilling effect.

Responding to social and political controversies

The big question for many employers is what position they should take, publicly or internally. Joining a growing group of business executives, Apple CEO Tim Cook, for example, strongly condemned the Charlottesville rally, labeling it "white supremacy" and "racist violence." He went on to say that there is no moral equivalence or comparison between white supremacists and Nazis and those who oppose them.

A wide range of employers also sent internal emails to employees, encouraging respectful dialogue while acknowledging our country's painful history with racism and anti-Semitism and stressing zero tolerance for hatred and bigotry. While this type of statement can have a positive impact, it can also be interpreted subjectively. When taking a stand publicly or internally, employers should clearly communicate workplace expectations, remind employees of company policies and train Human Resources professionals and managers accordingly.

An organization's ability to rebound from workplace tensions or to limit the legal exposure that may follow events like Charlottesville requires more than updating policies and providing training. Employers should invest resources and create expectations

and accountability around cultural competency and inclusion on an ongoing basis. As research continues to show, companies that embrace diversity and inclusion in all aspects of their business statistically outperform their peers, and this type of investment can also improve business performance.³ Importantly, it can also help heal our nation.

Footnotes

¹ *Bellamy v. Mason's Stores, Inc.*, 268 F. Supp. 1025, 1026 (E.D. Va. 1973) (holding that the Ku Klux Klan is not a religion under Title VII because the "proclaimed racist and anti-semitic ideology" has "narrow, temporal and political character inconsistent with the meaning of 'religion'").

² *Wiggins v. Sargent*, 753 F.2d 663, 667 (8th Cir. 1985) (Church of Jesus Christ Christian's white supremacist belief system was not precluded from being religious in nature where it was "based upon a literal interpretation of Biblical teachings").

³ McKinsey's research shows that gender-diverse companies are 15 percent more likely to outperform their peers, and ethnically-diverse companies are 35 percent more likely to do the same. Vivian Hunt et al., *Why diversity matters*, McKinsey & Company (Jan. 2015), <http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>. Catalyst research shows that companies with more women on the board statistically outperform their peers over a long period of time. Lois Joy, Ph.D. et al., *The Bottom Line: Corporate Performance and Women's Representation on Boards*, Catalyst (Oct. 15, 2007), <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards>. Deloitte Australia research shows that inclusive teams outperform their peers by 80 percent in team-based assessments. Deloitte Australia & Victorian Equal Opportunity & Human Rights Commission, *Waiter is that inclusion in my soup? A new recipe to improve business performance* (May 2013), available at <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/human-capital/deloitte-au-hc-diversity-inclusion-soup-0513.pdf>; see also Josh Bersin, *Why Diversity And Inclusion Will Be A Top Priority For 2016*, *Forbes* (Dec. 6, 2015), <https://www.forbes.com/sites/joshbersin/2015/12/06/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/#2f4a55e42ed5>.

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